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DEC - 5 2005

No. 05-352

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CUAUHTEMOC GONZALEZ-LOPEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

The Eighth Circuit has squarely decided a question that this Court noted but left unresolved in *Flanagan* v. *United States*, 465 U.S. 259, 267-269 (1984): whether a criminal defendant is entitled to automatic reversal of his conviction when the district court erroneously denies him representation by counsel of choice. See *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 438 (1985) (leaving comparable question open in a civil case and citing *Flanagan*). This Court should definitively resolve that issue now because, contrary to respondent's contentions, the court of appeals' rule of automatic reversal is fundamentally at odds with this Court's jurisprudence under the Sixth Amendment; its holding conflicts with the Seventh Circuit's decision in *Rodriguez* v. *Chandler*, 382 F.3d 670 (2004), cert. denied, 125 S. Ct. 1303 (2005); and the matter is of recurring importance to the administration of justice.

A. The Eighth Circuit's Rule Of Automatic Reversal Cannot Be Reconciled With This Court's Sixth Amendment Jurisprudence

Respondent's defense of the Eighth Circuit's rule (Br. in Opp. 15-20) assumes that the erroneous denial of the right to counsel of choice in and of itself violates the Sixth Amendment. He then argues that the violation must be classified as structural error. Both elements of that argument depart from this Court's Sixth Amendment jurisprudence.[1]

[1] Respondent also erroneously contends (Br. in Opp. 19) that "there is no dispute that the Sixth Amendment was violated." But the entire thrust of the government's petition is that, consistent with this Court's Sixth Amendment precedents, respondent cannot establish a consti-

As a general rule, "defects in assistance [of counsel] that have no probable effect upon the trial's outcome do not establish a constitutional violation." *Mickens* v. *Taylor*, 535 U.S. 162, 166 (2002). This Court has recognized an exception to that rule only when "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." *Ibid.* There is no basis for limiting that principle to ineffective-assistance cases; all claimed Sixth Amendment right-to-counsel violations must be linked to the purpose of that right, *i.e.*, to protect the reliability of the verdict. *Ibid.* Respondent's complaint here—that he was compelled to go to trial with his second-choice counsel—clearly does not create such a high likelihood of unreliability that case-by-case inquiry is unnecessary. Accordingly, respondent's view that the Constitution was violated and that reversal is warranted, without *any* showing of prejudice, departs from this Court's analysis of claimed Sixth Amendment violations.[2]

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tutional violation without demonstrating that the denial of counsel of choice subverted the fairness of his trial. See Pet. 8-19. While the government accepts for purposes of this Court's review that "the district court's refusal to admit Low *pro hac vice* was unjustified," Pet. 5 n.2, it does not accept that such refusal constituted a violation of the Sixth Amendment.

[2] Respondent contends (Br. in Opp. 15) that the government's proposed standard would require him to prove ineffective assistance of counsel in order to vindicate his right to counsel of choice and thus would "collapse the two rights together" (*id.* at 19). As explained in the petition (Pet. 14-15), that suggestion is incorrect. Significantly, respondent does not even mention the government's alternative proposal (see Pet. 15-16), under which respondent would be relieved of showing that his counsel provided deficient performance but would still have to show that his counsel of choice would have conducted the trial differently and that, in so doing, would have created a reasonable

Respondent argues (Br. in Opp. 16-18, 20) that a defendant challenging the erroneous rejection of his first-choice counsel should be relieved of the need to show prejudice, and that the error should be treated as structural, based on two factors. Neither of those factors finds support in this Court's authority.

First, citing *Faretta* v. *California*, 422 U.S. 806, 834 (1975), respondent equates the right to counsel of choice with the right to self-representation in that they both "protect[] a defendant's autonomy and dignity interests." Br. in Opp. 17. But *Faretta* did not even address the right to counsel of choice. And to the extent that the right to counsel of choice may further autonomy interests, this Court has made clear that such interests may be subordinated to concerns about, *inter alia*, the effective administration of justice. *Wheat* v. *United States*, 486 U.S. 153, 159-160 (1988). In that respect, respondent's autonomy interest is far weaker than that of a defendant electing self-representation. See *id.* at 159 n.3. Moreover, denial of a defendant's first-choice counsel does not necessarily deprive him of *all* choice; as in this case, such a defendant may still be represented by counsel accepted or selected by him.[3] Autonomy concerns in the counsel-of-first-choice context thus should

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probability of obtaining an acquittal. The Seventh Circuit has also formulated a prejudice test borrowed from this Court's conflict-of-interest cases, which again does not require proving constitutional ineffectiveness. See p. 5, *infra*.

[3] Respondent states (Br. in Opp. 8) that he "never chose" Dickhaus to represent him. In fact, in May 2003, respondent retained Dickhaus "as his local counsel to assist Mr. Low in the trial of this matter and to handle motion hearings, filings and other local responsibilities." Resp. C.A. Br. 15. Respondent has also informed the district court that he wants Dickhaus to assist Low in the event of a retrial. 09/01/05 Tr. 7.

receive minimal weight in determining whether an erroneous deprivation should invalidate a conviction.

Second, respondent argues (Br. in Opp. 17) that the denial of the right to counsel of choice is not amenable to review for prejudice because, unlike ineffective-assistance claims, the error "affects the entire framework" of the defendant's trial. The same, however, could be said about ineffective-assistance claims based upon, *inter alia*, failure to pursue a particular defense theory or to contest an element of the government's case. Yet, under this Court's cases, defendants asserting such claims are not relieved of proving prejudice. See, *e.g.*, *Florida* v. *Nixon*, 125 S. Ct. 551 (2004). Similarly, Sixth Amendment conflict-of-interest claims can be said to implicate "the entire framework" of the trial, but this Court has made clear that a defendant asserting such a claim generally must establish, at a minimum, that the conflict adversely affected his lawyer's performance. See *Mickens*, 535 U.S. at 174.

Respondent relies (Br. in Opp. 20) on *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), where the Court applied a rule of automatic reversal to a situation in which the defendant's lawyer jointly represented co-defendants over his own objection, but that case does not support the Eighth Circuit's automatic reversal rule. As this Court explained in *Mickens*, the rule of *Holloway* constitutes a narrow exception to the prejudice requirement which is justified by "the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice." 535 U.S. at 175. Proceeding to trial with second-choice counsel does not inherently create a "high probability of prejudice"; respondent does not claim otherwise.

Finally, contrary to respondent's contention (Br. in Opp. 18), the Eighth Circuit's rule of automatic reversal cannot be squared with this Court's decision in *Wheat*. The Court there, while recognizing that the right to counsel of choice is "comprehended by the Sixth Amendment," 486 U.S. at 159, emphasized that "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers," *ibid.* For that reason, this Court explained, "in evaluating Sixth Amendment claims, the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." *Ibid.* (internal quotation marks omitted). The Eighth Circuit's rule of automatic reversal nevertheless gives controlling weight to the attorney-client relationship that the defendant was denied without any consideration of the impact the deprivation may have had on the adversarial process.

B. The Eighth Circuit's Decision Conflicts With The Law Of The Seventh Circuit

Recognizing that a rule of automatic reversal for denial of counsel of choice does "not make sense" under this Court's precedents, the Seventh Circuit rejected such a rule in *Rodriguez*, in favor of a rule requiring the defendant to show that the error had an "adverse effect" on his representation at trial. 382 F.3d at 674, 675. Notwithstanding *Rodriguez*'s clear rejection of automatic reversal, respondent maintains (Br. in Opp. 5) that "[t]here is no genuine conflict" because *Rodriguez* was a habeas case presenting different facts and because he would be entitled to relief under *Rodriguez*'s approach. Respondent's contentions lack merit.

First, while it is undoubtedly true as a general rule that "courts are much less likely to require new trials" on habeas review (Br. in Opp. 7) and that "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment" (*ibid.*) (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 634 (1993)), those general observations do not apply here. That is because in the Seventh Circuit, a structural error justifies relief on habeas (assuming the claim of error is preserved) without inquiry into prejudice, just as it does on direct appeal. See *Franklin* v. *McCaughtry*, 398 F.3d 955, 960-962 (7th Cir. 2005) (granting habeas relief on claim that the trial judge was biased without requiring proof of prejudice and faulting state court for applying harmless-error review to structural error); see also *Harrison* v. *McBride*, No. 04-1398, 2005 WL 2787630 (7th Cir. Oct. 27, 2005). *Rodriguez* thus forecloses any claim in the Seventh Circuit that the denial of counsel of choice is a structural error that triggers automatic reversal—whether the claim is asserted on direct or collateral review.

Respondent further asserts the absence of a conflict on the basis of factual differences between this case and *Rodriguez*. As explained in the petition (Pet. 18 n.7), those differences do not negate the conflict. The *Rodriguez* court made clear that it was adopting the "adverse effect" standard for all claims that "the [trial] court wrongly stripp[ed] the defendant of his preferred lawyer" (382 F.3d at 675) and not merely for those cases in which the defendant continues to be represented by one counsel of choice. That uniform standard for choice-of-counsel claims followed from the court's categorical rejection of a rule of automatic reversal as inconsistent with this Court's Sixth Amendment cases. *Id.* at 674-

675. The *Rodriguez* court noted the fact that the defendant continued to be represented by one of his two chosen counsel not to limit the scope of its "adverse effect" standard, but to emphasize that a rule of automatic reversal is "particularly" illogical in that circumstance. *Id.* at 674.

Finally, respondent contends that the decision below and *Rodriguez* are not in "actual conflict" (Br. in Opp. 10) because he would satisfy the Seventh Circuit's "adverse effect" test. No court has determined, however, that respondent could establish an "adverse effect" on his representation, and it is anything but clear that he could. Respondent contends (*ibid.*) that he could prevail in the Seventh Circuit simply by pointing to Low's greater experience in handling criminal trials. But *Rodriguez* suggested only that an adverse effect "might" be shown if the preferred lawyer "had expertise that his other lawyer lacked," 382 F.3d at 675, and other statements in the court's opinion indicate that the standard might require a showing that is more concrete: "[disqualified counsel] has not filed an affidavit detailing what he would have done differently had he conducted the trial or how the defense otherwise might have been affected by his absence." *Ibid.*

Respondent contends (Br. in Opp. 11) that he could satisfy that more concrete showing because Low has taken the deposition of a government witness and "completely discredited [him]."[4] That disputed proposition could be tested, however, only at the type of evidentiary hearing that the Eighth Circuit's rule has rendered su-

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[4] That deposition of witness Jorge Guillen was not part of the record before the district court or the court of appeals. The deposition took place after rehearing en banc was denied and the government learned that three of its witnesses were facing imminent deportation.

perfluous. Moreover, even if it were conceded that a defendant's back-up counsel-of-choice was a better, more vigorous advocate, the Eighth Circuit's rule would mandate reversal. The oddity of a rule that would require reversal even if substitute counsel were a modern-day Clarence Darrow justifies review, regardless of how petitioner might fare under *Rodriguez* or any other actual-prejudice test this Court might announce.

C. The Government Properly Raised The Question Presented

Respondent's contention (Br. in Opp. 11-12) that the court of appeals' decision is a poor vehicle because the government did not properly challenge the automatic reversal rule below is equally without merit. The government argued in its court of appeals brief that any error by the district court in denying Low admission *pro hac vice* was harmless because respondent "was represented by able counsel throughout all of the proceedings." Gov't C.A. Br. 28. Respondent did not consider the government's argument waived, see Resp. C.A. Reply Br. 22-23, nor did the court of appeals, which engaged in an extensive, though flawed, analysis of the nature of the district court's error in concluding that the error required automatic reversal. See Pet. App. 13a-20a. The question presented was thus both "pressed" *and* "passed upon." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (holding that either is sufficient for a grant of certiorari). The question whether automatic reversal is appropriate thus is squarely and properly presented for this Court's review.

D. The Eighth Circuit's Rule Of Automatic Reversal Presents A Question Of Recurring Importance

Respondent's contention (Br. in Opp. 12-14) that the question presented is not important enough to warrant this Court's review is wrong on several counts. First, challenges to the denial of counsel of choice arise on a regular basis. Such challenges are made when, *inter alia*, an attorney is disqualified for a conflict of interest, see *Wheat*, *supra*, a continuance is denied, see *Ungar* v. *Sarafite*, 376 U.S. 575 (1964), or a defendant's assets are frozen, see *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989); *United States* v. *Monsanto*, 491 U.S. 600 (1989). Courts faced with such common challenges should have the benefit of this Court's guidance on the disposition of those cases, such as this one, in which the denial of counsel of choice is found to be erroneous.

Second, the question presented is hardly a novel one. This Court has adverted to the issue twice, see *Flanagan*, *supra*, and *Richardson-Merrell*, *supra*, and a majority of the circuits have decided it. See Pet. App. 16a (citing numerous circuit court decisions that have adopted automatic reversal and acknowledging conflicting authority).

Finally, respondent's attempt to minimize the significance of the rule of automatic reversal rings hollow. As this Court has repeatedly emphasized, "[t]he reversal of a conviction entails substantial societal costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place." *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986) (citing *Morris* v. *Slappy*, 461 U.S. 1, 14 (1983)).

And because of the "passage of time, erosion of memory, and dispersion of witnesses," *ibid.* (brackets and internal quotation marks omitted), requiring a retrial will sometimes "cost society the right to punish admitted offenders" and, even when retrial does not carry that high cost, "the intervening delay may compromise society's interest in the prompt administration of justice," *ibid.* (internal quotation marks omitted). These consequences are simply not "acceptable" (*ibid.*) here because there is no reason to believe that proceeding to trial with second-choice counsel, as respondent did, has automatically "deprived a defendant of a fair determination of the issue of guilt or innocence." *Ibid.*; see *Neder* v. *United States*, 527 U.S. 1, 8-9 (1999); *Johnson* v. *United States*, 520 U.S. 461, 468-469 (1997).

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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